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No. 10-1053

Supreme Court, U.S.
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In the
Supreme Court of the United States

ISOLINA PICON,

Petitioner,

v.

PETER A. BENSON, COUNTY OF SAN MATEO, ROBERT FOUCRAULT,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of California, First Appellate District

BRIEF FOR RESPONDENT PETER A. BENSON IN OPPOSITION

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Respondent, Peter A. Benson, respectfully requests that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

Petitioner has attached to her petition for writ of certiorari copies of the following opinions and orders: (1) Opinion of the Court of Appeal of the State of California, First Appellate District, Division Four (Petn. App. 1-22); (2) Order of the Supreme Court of California Denying Petition for Review (Petn. App. 23); (3) Order of the Supreme Court of California extending time to file reply to answer to petition for review (Petn. App. 24); (4) Superior Court of the State of California Order After Remittitur, dated Nov. 5, 2010 (Petn. App. 25); (5) Superior Court of the State of California Judgment in Favor of Peter A. Benson, M.D., dated Nov. 23, 2010 (Petn. App. 26-27); (6) Superior Court of the State of California Judgment in Favor of Defendants County of San Mateo and Robert Foucrault, dated Nov. 22, 2010 (Petn. App. 28-29); (7) Court of Appeal of the State of California, First Appellate District, Division Four Order Granting Publication (Petn. App. 30-31); and (8) Peremptory Writ of Mandate dated Oct. 25, 2010, issued by the Court of Appeal of the State of California, First Appellate District, Division Four (Petn. App. 32-33).

Petitioner did not attach a copy of the United States District Court for the Northern District of California's Order Granting Defendants' Motion to Dismiss Plaintiff's Fourth Cause of Action; Remanding Case to San Mateo Superior Court, filed July 10, 2008. A copy of that order, which is unreported, is attached hereto as Respondent's Appendix ("Resp. App.").

JURISDICTION

Petitioner has not clearly identified the basis on which she invokes this court's jurisdiction. However, she argues she has been deprived of her rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Because Petitioner asks this court to review the decision of a California Court of Appeal, Respondent assumes Petitioner invokes this court's jurisdiction under 28 U.S.C. § 1257(a).

The petition is untimely. The question whether Respondents deprived Petitioner of her rights under the Due Process Clause of the Fourteenth Amendment by retaining Joseph Picon's heart for further analysis as part of a lawful autopsy, without notice to and consent of his next of kin, was decided adversely to Petitioner by the United States District Court for the Northern District of California on July 10, 2008. Petitioner did not seek review of that order and the time for doing so has long since expired. The petition for a writ of certiorari with respect to that issue is therefore untimely and should be denied.

In addition, Petitioner's claim that Respondents violated her rights under the Due Process Clause of the Fourteenth Amendment was not properly raised in the state courts whose decisions Petitioner asks this court to review. Petitioner's Third Amended Complaint (the operative complaint) does not allege a violation of Petitioner's rights under the Due Process Clause. Furthermore, the San Mateo County Superior Court (the trial court) was not asked to and did not consider a claim that Petitioner's due process rights were violated. The California Court of Appeal for the

First Appellate District, whose decision is the subject of this petition, was not asked to and did not consider or rule on Petitioner's claim that her due process rights under the Fourteenth Amendment were violated. Petitioner's belated reference to an alleged due process violation in her reply brief to the California Supreme Court is insufficient to justify review by this court. Moreover, the reference to an alleged due process violation in that reply brief does not indicate whether it refers to due process rights under the California Constitution or under the United States Constitution.

Furthermore, Petitioner did not assert a claim against Peter A. Benson ("Dr. Benson") based upon an alleged violation of her due process rights. Dr. Benson was not named as a defendant until Petitioner filed her Second Amended Complaint, after the United States District Court had dismissed her Section 1983 claim and remanded the case to state court. Neither the Second Amended Complaint, in which Dr. Benson was first named as a defendant, nor the Third Amended Complaint included a claim alleging a violation of Petitioner's due process rights. As a result, there is no basis for review of a claim that Dr. Benson violated Petitioner's due process rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal constitutional and statutory provisions at issue in this matter are the following:

(1) The Fourteenth Amendment to the United States Constitution, Section 1, which provides in pertinent part as follows:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

(2) California Government Code section 27491.4, subparagraph (a), which provides in pertinent part as follows:

> For purposes of inquiry . . . the coroner may, in his or her discretion, take possession of the body, . . . order it removed to a convenient place, and make or cause to be made a postmortem examination or autopsy thereon, and make or cause to be made an analysis of the stomach, stomach contents, blood, organs, fluids, or tissues of the body. The detailed medical findings resulting from an inspection of the body or autopsy by an examining physician shall be either reduced to writing or permanently preserved on recording discs or other similar recording media, shall include all positive and negative findings pertinent to establishing the cause of death in accordance with medicolegal practice and this, along with the written opinions and conclusions of the examining physician, shall be included in the coroner's record of the death. The coroner shall have the right to retain only those tissues of the body removed at the time of the autopsy as may, in his or her opinion, be necessary or advisable to the inquiry into the case, or for the verification of his or her findings. . . .

(3) California Government Code section 27491.45, subparagraph (a), which provides in pertinent part as follows:

(1) The coroner shall have the right to retain parts of the body, as defined in subdivision (g) of Section 7150.1 of the Health and Safety Code, removed at the time of autopsy or acquired during a coroner's investigation as may, in the opinion of the coroner, be necessary or advisable for scientific investigation and training. The coroner may employ or use outside laboratories, hospitals, or research institutions in the conduct of the coroner's scientific investigation or training.

(2) Parts of the body retained pursuant to paragraph (1) may be released by the coroner to hospitals, medical educational research institutions, and law enforcement agencies for noncoroner training, educational, and research purposes, either upon consent of the decedent or other person, as specified in Section 7151 of the Health and Safety Code, or after a reasonable effort has been made to locate and inform persons listed in subdivision (a) of Section 7151 of the Health and Safety Code of their option to consent or object to the release, and the appropriate person consents or that effort has been unsuccessful. . . .

STATEMENT OF THE CASE

Factual Background

Respondent believes the facts of the case are accurately summarized in the decision by the California Court of Appeal for the First Appellate District. [Petn. App. 1-22] In the interests of brevity, the facts as set forth in that decision are therefore incorporated herein by reference. However, it is

important to note it was undisputed that the autopsy in this case was lawfully performed. In addition, the San Mateo County Coroner, Respondent Robert Foucrault, is not a medical doctor. As a result, it was necessary for the County of San Mateo to contract with one or more licensed physicians, such as Dr. Benson, to perform autopsies for the Coroner's Office. Finally, contrary to the statement in the petition, Nicholas Picon's heart never left the San Mateo County Coroner's custody and, in particular, it was never sent to Stanford University.

Procedural History

Petitioner filed the original Complaint in this matter in San Mateo County Superior Court on October 24, 2007. The Complaint named the County of San Mateo and Robert Foucrault, individually and as Coroner, as defendants, and alleged three causes of action: (1) Denial of Quasi-Property Right to Control the Disposition of the Remains of a Deceased Person; (2) Breach of Mandatory Duty Government Code § 815.6; and (3) Negligent Infliction of Emotional Distress.

On January 29, 2008, Petitioner filed a First Amended Complaint. It set forth essentially the same causes of action as the original Complaint, but added a Fourth Cause of Action asserting a claim for "Unconstitutional Deprivation of Property Under 42 U.S.C.S. § 1983," alleging the County of San Mateo and Robert Foucrault, individually and as Coroner, had violated Petitioner's constitutional right to due process under the Fourteenth Amendment to the United States Constitution. The defendants, County of San Mateo and Robert Foucrault, then removed the

case to the United States District Court for the Northern District of California. On July 10, 2008, The Honorable Samuel Conti, Judge, of United States District Court for the Northern District of California, dismissed the Fourth Cause of Action with prejudice and remanded the case to the San Mateo County Superior Court for further proceedings on the state law causes of action. [Resp. App.]

On September 12, 2008, Petitioner filed a Second Amended Complaint alleging only two causes of action: (1) Denial of Quasi-Property Right to Control the Disposition of the Remains of a Deceased Person; and (2) Negligence. The Second Amended Complaint named as defendants the County of San Mateo, Robert Foucrault, individually and as Coroner, and, for the first time, Dr. Peter Benson "individual & as Examiner."

On January 13, 2009, Petitioner filed a Third Amended Complaint. It alleged the same two causes of action as the Second Amended Complaint and named as defendants the County of San Mateo, Robert Foucrault, individually and as Coroner, and Dr. Peter Benson "individual & Examiner." The Third Amended Complaint was the operative pleading at the time of the summary judgment motions that were the subject of the decision by the California Court of Appeal to which this petition relates.

On October 9, 2009, Dr. Benson filed his motion for summary judgment. The motion was heard and denied by the San Mateo County Superior Court on December 21, 2009. Dr. Benson sought review of the order denying his motion for summary judgment by way of a petition for a writ of mandate, which was filed

on January 12, 2010. On May 25, 2010, the California Court of Appeal, First Appellate District, Division Four, issued its decision granting Dr. Benson's petition. That is the decision (Petn. App. 1-22) Petitioner seeks to have this court review.[1] On June 22, 2010, the Court of Appeal issued its order granting publication of its decision. [Petn. App. 30-31]

After the Court of Appeal decision was issued, Petitioner sought review by the California Supreme Court, which was denied. [Petn. App. 23 and 24] Thereafter, on October 25, 2010, the Court of Appeal issued its remittitur and its peremptory writ of mandate requiring the San Mateo County Superior Court to vacate its order denying Dr. Benson's motion for summary judgment and enter a new order granting that motion. [Petn. App. 32-33]

In accordance with the Court of Appeal's peremptory writ of mandate, on November 5, 2010, the San Mateo County Superior Court entered an order vacating its order denying Dr. Benson's motion for summary judgment and entering a new order granting that motion. [Petn. App. 25] Subsequently, on November 23, 2010, the San Mateo County Superior Court entered judgment in favor of Dr. Benson and against Petitioner, Isolina Picon. [Petn. App. 26-27]

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[1] A motion for summary judgment or, in the alternative, for summary adjudication, filed by the County of San Mateo and Robert Foucrault was also heard and denied on December 21, 2009. The County and Coroner Foucrault also filed a petition for a writ of mandate seeking review of the Superior Court's denial of their motion. The Court of Appeal consolidated Dr. Benson's writ petition with that filed by the County and Coroner Foucrault and issued a single decision on May 25, 2010.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Petition is Untimely

When Petitioner filed her First Amended Complaint in state court, she added a cause of action asserting a claim for damages under 42 U.S.C. § 1983.[2] [Petn. 4] At that point the County of San Mateo and Coroner Foucrault removed the case to the United States District Court for the Northern District of California. [Petn. 4; see Resp. App. 2a] The County and Coroner Foucrault then filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. [See Resp. App. 2a]

On July 10, 2008, the motion to dismiss filed by San Mateo County and Coroner Foucrault was granted as to the cause of action asserting a claim for damages under Section 1983. [Resp. App. 2a, 11a-12a] The District Court concluded: "Regardless of whether the alleged property interest in question is the right to possess the deceased son's heart or the right to determine the disposition of the deceased son's remains, Plaintiff's claim fails." [Resp. App. 7a] The District Court therefore held: "Because Plaintiff has failed to identify a property interest protected by the Fourteenth Amendment, she has failed to satisfy the first element of a section 1983 claim. Even if the property interests Plaintiff claims were protected, however, she has failed to allege facts sufficient to show that she was deprived of those interests.

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[2] Dr. Benson had not yet been named as a defendant when Petitioner filed her First Amended Complaint.

Plaintiff's section 1983 claim is therefore dismissed." [Resp. App. 11a] Accordingly, the District Court dismissed, with prejudice, Petitioner's Fourth Cause of Action for unconstitutional deprivation of property under 42 U.S.C. § 1983, and then remanded the case to the San Mateo County Superior Court for further proceedings with respect to the remaining claims. [Resp. App. 11a-12a]

Although remand orders generally are not reviewable (28 U.S.C. § 1447(d)), where a district court makes a substantive decision on the merits that is followed by a remand to state court, the dismissal is reviewable. *Gallea v. United States*, 779 F.2d 1403, 1404 (9th Cir. 1986); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-277 (9th Cir. 1984). Otherwise, the dismissal would be immune from review. *Id.*

If an order by a United States District Court is reviewable, a party normally must seek review of the order within 30 days after it is entered. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). Petitioner did not seek review of the District Court's order dismissing her Section 1983 claim within 30 days after it was entered, and the time for doing so has not been extended. Her effort at this point to seek review of her claim that the defendants deprived her of a property right in violation of the Due Process Clause of the Fourteenth Amendment is therefore untimely.

II. Petitioner Failed to Properly Raise Her Due Process Claims in the Courts Whose Decisions She Asks This Court to Review

Petitioner argues she raised her due process claim at the trial court level by adding a cause of action for damages under 42 U.S.C. § 1983 to her First Amended Complaint. [Petn. 6] However, as noted, that claim was dismissed with prejudice by the United States District Court and Petitioner did not seek review of that order. Furthermore, Dr. Benson had not yet been named as a party when that claim was dismissed, and Petitioner never attempted to plead such a claim against Dr. Benson.

Petitioner has not suggested she argued in opposition to Dr. Benson's motion for summary judgment that the motion should be denied because, if granted, it would result in a denial of due process under the Fourteenth Amendment. Nor has Petitioner suggested she made such an argument to the California Court of Appeal in opposition to Dr. Benson's petition for a writ of mandate. It is clear from the Court of Appeal's decision granting Dr. Benson's petition (Petn. App. 1-22) that the court did not consider or decide any claim that issuance of the writ would result in a denial of due process under the Fourteenth Amendment.

Other than adding the cause of action for damages under 42 U.S.C. § 1983 to her First Amended Complaint, the only point at which Petitioner suggests she raised her due process claim in the courts whose decision she asks this court to review was in her reply to the defendants' opposition to her petition for review by the California Supreme Court. [Petn. 7] At that

point it was far too late to properly raise the due process claim for purposes of subsequent review by this court. *E.g., Zadig v. Baldwin*, 166 U.S. 485, 488, 17 S.Ct. 639, 640, 41 L.Ed. 1087 (1897); *New York Cent. & H.R.R. Co. v. City of New York*, 186 U.S. 269, 272-273, 22 S.Ct. 916, 916, 46 L.Ed. 1158 (1902).

Finally, Petitioner has failed to demonstrate she made clear in her reply brief to the California Supreme Court that she was claiming a deprivation of due process under the Fourteenth Amendment to the United States Constitution, as opposed to her right to due process under article 1, section 7 of the California Constitution. [See Petn. 7] Where, as here, the state Constitution also includes a Due Process Clause and the petitioner, in asserting in the court below that he or she has been deprived of a property right without due process of law, fails to make reference to the United States Constitution as the source of that right, there is no basis for invoking the jurisdiction of the United States Supreme Court. *Bowe v. Scott*, 233 U.S. 658, 664-665, 34 S.Ct. 769, 771, 58 L.Ed. 1141 (1914).

III. Petitioner Was Not Deprived of Due Process In Violation of the Fourteenth Amendment

In an effort to justify her petition for writ of certiorari, Petitioner has tried mightily to characterize the Court of Appeal decision in this case as depriving her of due process rights under the Fourteenth Amendment. In reality, however, she is simply asking this court to review and reverse the California Court of Appeal's determination that, under state law, Dr. Benson did not have a duty to notify and obtain Petitioner's consent before retaining Nicholas Picon's

heart for further examination to determine the cause of his death.

A. The failure to obtain Petitioner's consent before retaining Nicholas Picon's heart did not deprive Petitioner of a property right in violation Due Process Clause of the Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment provides that a state must not "deprive any person of life, liberty, or property, without due process of law." Thus, in order to state a claim for deprivation of a property interest without due process in violation of the Fourteenth Amendment, the plaintiff must prove three elements: (1) the existence of a property interest protected by the Constitution, (2) a deprivation of the interest by the government, and (3) a lack of required process. *See*, e.g., *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993).

The United States Constitution protects rather than creates property interests. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 163-164, 118 S.Ct. 1925, 1930, 141 L.Ed. 174 (1998). As a result, the existence of a property right is determined by reference to "existing rules or understandings that stem from an independent source such as state law." *Id.*, quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed. 548 (1972). Thus, the existence of a protected property interest is normally a question of state law. *E.g.*, *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993).

In the instant case, Petitioner has never clearly articulated the "protected property interest" of which she claims she was deprived. In fact, the California courts have long held "there is no right of property as such in the dead body of a human being." *Gray v. S. Pac. Co.*, 21 Cal.App.2d 240, 246, 68 P.2d 1011 (1937); *see also*, *Enos v. Snyder*, 131 Cal. 68, 69, 63 P. 170 (1900). On the other hand, the courts have held a deceased person's next of kin have a limited "quasi-property right" to temporary custody of the body for purposes of burial. *Huntly v. Zurich Gen. Accident & Liab. Ins. Co.*, 100 Cal.App. 201, 208, 280 P. 163 (1929); *see also*, *Gray v. S. Pa. Co.*, 21 Cal.App.2d 240, 246, 68 P.2d 1011 (1937). Unlawful interference with that "quasi-property right" has been held to give rise to a cause of action in tort. *E.g.*, *Sinai Temple v. Kaplan*, 54 Cal.App.3d 1103, 1110-1112, 127 Cal.Rptr. 80 (1976) .

It is undisputed that the autopsy performed by the Coroner's Office on Nicholas Picon's body was lawful. When a body on which a lawful autopsy has been performed is released for burial, the Coroner is authorized to retain such body parts and tissues as may, in the Coroner's opinion, be necessary or advisable to his or her inquiry into the case, for the verification of his or her findings, or for scientific investigation or training. Cal. Govt. Code §§ 27491.4(a) and 27491.45(a)(1). Thus, to the extent a decedent's next of kin may have limited "quasi-property right" under California law to temporary custody of the body for purposes of burial, he or she does not have a protected property interest in body parts and tissues that are retained by the Coroner for the purposes specified in the aforementioned statutes.

The gravamen of Petitioner's complaint appears to be that the Coroner's Office did not obtain her consent before retaining Nicholas Picon's heart when his body was released for burial. Petitioner has failed to cite any authority suggesting the Coroner had an obligation to do so, much less that she was deprived of a protected "property right" by his failure to do so. On the contrary, the California Court of Appeal correctly concluded, as a matter of state law, that California Government Code sections 27491.4(a) and 27491.45(a)(1) (unlike California Government Code section 27491.45(a)(2)) do not require the Coroner to notify or obtain consent from the decedent's next of kin before retaining body parts or tissues to determine the cause of death or for scientific investigation or coroner training. [Petn. App. 11] As a result, Petitioner has failed to demonstrate the existence of a protected property interest of which she was allegedly deprived.

Finally, the decision of the New York Supreme Court, Appellate Division, in *Shipley v. City of New York*, 80 A.D.3d 171, 908 N.Y.S.2d 425 (2010) does not support Petitioner's claim that she was deprived of a property right without due process. In *Shipley* the court simply held the medical examiner had a duty, under the state (New York) law right of seplucher, to inform the next of kin, when a body is released for burial, that a part of the body is being retained. 80 A.D.3d at 179, 908 N.Y.S.2d at 432. *Shipley* did not hold the medical examiner had deprived the decedent's next of kin of a protected property right by failing to do so. In fact, the court emphasized this point by acknowledging the decision in *Albrecht v. Treon*, 118 Ohio St. 3d 348, 889 N.E.2d 120 (2008), but specifically distinguishing it on the ground it was based on a due process analysis of the next of kin's property interest

in a decedent's bodily organs rather than on a duty imposed by New York law under the right of sepulcher. 80 A.D.3d at 178, 908 N.Y.S.2d at 431.

B. Petitioner's other due process claims are without merit

Petitioner alleges several other due process violations in support of her petition for writ of certiorari. None of those claims has merit.

Petitioner argues she was deprived of due process by the California Court of Appeal's interpretation of California Government Code sections 27491.4(a) and 27491.45(a) together in determining that neither Dr. Benson, San Mateo County, nor Coroner Foucrault had a duty to notify Petitioner and obtain her consent before retaining Nicholas Picon's heart for further examination in order to determine the cause of death. [Petn. 15-16] On the contrary, one of the fundamental rules of statutory construction is that when statutes are *in pari* materia, they should be construed together as one statute. *City of Huntington Beach v. Bd. of Admin.*, 4 Cal.4th 462, 468, 14 Cal.Rptr.2d 514, 841 P.2d 1034 (1992). "In this regard, all parts of a statute should be read together and construed in a manner that gives effect to each, yet does not lead to disharmony with the others." *Id.*

The phrase "*in pari* materia" means "'[o]f the same matter; on the same subject' . . ." *Altaville Drug Store, Inc. v. Emp't Dev. Dep't*, 44 Cal.3d 231, 236, fn. 4, 242 Cal.Rptr. 732, 746 P.2d 871 (1988). Statutes are considered to be *in pari materia* when they relate to the same person or thing, to the same class of persons [or] things, or have the same purpose or object. *Walker*

v. Superior Court, 47 Cal.3d 112, 124, fn. 4, 253 Cal.Rptr. 1, 763 P.2d 852 (1988). California Government Code sections 27491.4(a) and 27491.45(a) clearly are *in pari materia*, and interpreting them together is entirely appropriate. It certainly does not constitute a denial of due process.

Petitioner's claim that she was deprived of due process because the California Court of Appeal failed to undertake a *de novo* review of the San Mateo County Superior Court's order denying the defendants' motions for summary judgment (Petn. 7-10) is also without merit. It is readily apparent from the Court of Appeal's decision (Petn. App. 1-22) that it did in fact undertake a *de novo* review of the Superior Court's rulings on those motions. Furthermore, as Dr. Benson understands this argument, it applies only to the Court of Appeal's decision with respect to San Mateo County and Coroner Foucrault. As a result, this argument does not support the petition for writ of certiorari with respect to Dr. Benson.

In what may be a related contention, Petitioner claims the Court of Appeal improperly based its decision in favor of San Mateo County and Coroner Foucrault on arguments raised only by Dr. Benson. [Petn. 9-10] Dr. Benson believes this claim is unfounded, but in any event it apparently relates only to San Mateo County and Coroner Foucrault. As a result, it does not support the petition for writ of certiorari with respect to Dr. Benson.

Petitioner also suggests the California Court of Appeal's conclusion that, under California law, a Coroner is authorized to delegate decisions regarding retention of body parts removed during autopsy for

further examination for the purpose of determining or confirming the cause of death to an independent contractor physician who is retained for the purpose of performing autopsies somehow involves a denial of due process under the Fourteenth Amendment. [Petn. 13-15] Petitioner has cited no authority for this proposition, and Dr. Benson believes there is none. In any event, the existence of such authority is strictly an issue of state law and does not support issuance of a writ of certiorari in this matter.

Finally, as Dr. Benson understands the petition, Petitioner claims she was somehow denied due process under the Fourteenth Amendment when the California Court of Appeal reviewed the Superior Court's order denying Dr. Benson's motion for summary judgment and, upon determining that Petitioner had failed to raise a triable issue of material fact, issued a writ of mandate requiring the Superior Court to vacate its order denying that motion and enter a new order granting the motion. [Petn. 16-17] This procedure is specifically authorized by state statute, California Code of Civil Procedure section 437c, subparagraph m(1). Furthermore, as noted in *Scheiding v. Dinwiddie Constr. Co.*, 69 Cal.App.4th 64, 81 Cal.Rptr.2d 360 (1999): "California and federal courts long ago agreed that nothing in the summary judgment procedure is inherently unconstitutional." 69 Cal.App.4th at 70-71, 81 Cal.Rptr.2d at 364, citing *Bank of Am., etc. v. Oil Well S. Co.*, 12 Cal.App.2d 265, 270, 55 P.2d 885 (1936), and *Fid. & Deposit Co. v. United States*, 187 U.S. 315, 23 S.Ct. 120, 47 L.Ed. 194 (1902). Numerous federal courts have held that where no genuine issue of material fact exists, the court may, without violating Seventh Amendment rights, grant summary judgment pursuant to Rule 56 of the Federal

Rules of Civil Procedure. *E.g., Shore v. Parklane Hosiery Co., Inc.*, 565 F.2d 815, 819 (2d Cir. 1977) *aff'd*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); *Page v. Work*, 290 F.2d 323, 334 (9th Cir. 1961); *United States v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957). Having determined that Petitioner failed to raise a triable issue of material fact by her opposition to Dr. Benson's motion for summary judgment, issuance of a writ of mandate requiring the trial court to vacate its order denying that motion and enter a new order granting the motion did not violate Petitioner's rights under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-08-766 SC

[Filed July 10, 2008]

ISOLINA PICON,	)
	)
Plaintiff,	)
	)
v.	)
	)
COUNTY OF SAN MATEO, ROBERT FOUCRAULT, Individual and as Coroner, SAN MATEO COUNTY,	)
	)
Defendants.	)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FOURTH CAUSE OF ACTION; REMANDING CASE TO SAN MATEO SUPERIOR COURT

I. INTRODUCTION

Isolina Picon ("Plaintiff" or "Picon") sued the County of San Mateo and County Coroner, Robert Foucrault ("Coroner," collectively "Defendants"), in San Mateo County Superior Court, alleging that after

her son died of natural causes, the Coroner's office returned the body to her without informing her that they had retained her son's heart. Picon brought causes of action for breach of the right to control the disposition of the remains of a deceased person, breach of a mandatory duty, negligent infliction of emotional distress, and denial of due process under 42 U.S.C. § 1983. See Supp. Notice of Removal, Docket No. 3, Ex. A-9 ("FAC").[1] Defendants removed the case to this Court pursuant to 28 U.S.C. § 1441 on the grounds that the section 1983 claim is within the Court's original jurisdiction. See Notice of Removal, Docket No. 1.

Now before the Court is Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Motion"). Docket No. 9. Picon filed an Opposition and Defendants filed a Reply. Docket Nos. 14, 15. Having considered the parties' arguments in full, the Court hereby GRANTS Defendants' Motion with respect to the Fourth Cause of Action. The Court REMANDS the matter to the San Mateo County Superior Court for consideration of the remaining causes of action.

II. BACKGROUND

According to the FAC, Plaintiff's son Nicholas Picon died of natural causes on October 25, 2006. He was 23 years old. The Coroner conducted an autopsy on October 26, 2006. After the autopsy, the Coroner retained Nicholas Picon's heart and released the

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[1] The complaint on which Defendants based removal was the First Amended Complaint in the state court proceedings.

remainder of Nicholas's body to the funeral home. According to the autopsy report, the Coroner conducted an additional examination of the heart on October 29. See FAC Ex. A at 3, 5 ("Report").

Plaintiff had a funeral for her son on October 30, 2006. Following the funeral, Plaintiff learned for the first time that the Coroner had retained the heart. On November 13, Plaintiff requested a copy of the Report. After reviewing the Report, Plaintiff contacted the district attorney and the Coroner. Plaintiff repeatedly requested that her son's heart be returned. On November 21, the Coroner returned the heart to Plaintiff.

Plaintiff alleges that by retaining her son's heart for the period between October 26 and November 21, 2006, the Coroner denied her a quasi-property right to control the disposition of the remains of her son, breached a mandatory duty, negligently inflicted emotional distress, and deprived her of her property interest in the remains of her son without due process.

III. PROCEDURAL ISSUES

Before addressing the merits of Defendants' Motion, the Court must consider procedural concerns raised in Plaintiff's Opposition. Plaintiff asserts that Defendants' Motion should be denied because Defendants failed to attach a proposed order, in violation of Civil Local Rule 7-2(c), and because Defendants did not provide a supporting declaration, in violation of Civil Local Rule 7-5(a). Failure to comply with the Civil Local Rules may be grounds for the imposition of any authorized sanction. See Civ. L.R. 1-4.

An affidavit or declaration is only required where the moving party makes factual contentions or offers documentary evidence in support of its motion. Civ. L.R. 7-5(a). Defendants brought their Motion pursuant to Federal Rule of Civil Procedure 12(b)6), arguing that, even if the allegations of the FAC are true, Plaintiff has failed to state a claim on which relief can be granted. The Court resolves the Motion on the face of the pleadings; as such, no affidavit or declaration was necessary.

Unless excused by the Court, a motion must be accompanied by a proposed order. Civ. L.R. 7-2(c). Defendants did not provide a proposed order until they submitted their reply brief. See Docket No. 16. As the Motion makes clear that the relief Defendants seek is dismissal of all claims, Plaintiff suffered no prejudice by the delayed submission of a proposed order. The purpose of the Civil Local Rules is to "promote the just, efficient, speedy and economical determination of every action and proceeding." Civ. L.R. 1-2(b). The delayed submission did not interfere with this purpose, so the Court sees no reason to impose the severe sanction of denying the Motion solely on this basis.[2]

IV. LEGAL STANDARD

A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss tests the sufficiency of the complaint. Dismissal pursuant to Rule 12(b)(6) is appropriate if

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[2] The Court notes that Plaintiff's entire Opposition was submitted with formatting in violation of Civil Local Rule 3-4(c)(2). Were the Court to require the strict adherence to the Civil Local Rules that Plaintiff advocates, Plaintiff's brief would be stricken.

the plaintiff is unable to articulate "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007). When evaluating a motion to dismiss, the court accepts the facts as stated by the nonmoving party and draws all reasonable inferences in its favor. See Everest & Jennings, Inc. v. Am. Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994). Furthermore, the court must assume that all general allegations "embrace whatever specific facts might be necessary to support them." Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994). At the pleading stage, the plaintiff "need only show that the facts alleged, if proved, would confer standing upon him." Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1140 (9th Cir. 2003).

When considering a motion to dismiss, the court is generally limited to the allegations in the complaint, without extrinsic evidence. See, e.g., Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989). However, where another document is attached to the complaint, as it was here, the court may treat that document as part of the complaint and consider it when ruling on a motion to dismiss. See id.; Fed. R. Civ. P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."). The Court therefore considers the contents of the Report, attached to the FAC as an exhibit, part of Plaintiff's factual allegations.

V. DISCUSSION

Plaintiff's Fourth Cause of Action is for deprivation of a property right without due process, in violation of

the Fourteenth Amendment. Section 1983 of Title 42 creates a cause of action for such deprivation:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. To prevail on an action brought under section 1983, a plaintiff must prove three elements: (1) a property interest protected by the Constitution; (2) a deprivation of the interest by the government; and (3) lack of required process. See Portman v. County of Santa Clara, 995 F.2d 898, 904 (9th Cir. 1993). The existence of a protected property interest is a question of state law. Id.

Plaintiff's attempts to identify the protected property interest at issue are unsuccessful. In the FAC, Plaintiff states:

> Here, the San Mateo County Coroner deprived plaintiff Isolina Picon of the heart of her deceased son for nearly thirty days. The actions of the County Coroner caused a deprivation of plaintiffs' property without due process of law in violation of the Fourteenth Amendment. The heart was retained without the knowledge of the plaintiff and without an attempt to notify

> her and request consent to retain the organ for scientific purposes.

FAC at 14-15. Plaintiff barely even addresses the section 1983 claim in her Opposition, other than this brief discussion:

> Here, the entire heart organ of the plaintiffs [sic] deceased son was removed and retained by the Coroner of the County of San Mateo which resulted in her being deprived of the right to determine the disposition of his remains at burial. Since, the law recognizes the quasi property right of the remains of a deceased person the second prong has been sufficiently plead.

Opp'n at 9-10.

Regardless of whether the alleged property interest in question is the right to possess the deceased son's heart or the right to determine the disposition of the deceased son's remains, Plaintiff's claim fails. Plaintiff relies on the Ninth Circuit decision in Newman v. Sathyavaglswaran, 287 F.3d 786 (9th Cir. 2002). See FAC at 13; Opp'n at 6. In Newman, the coroner had removed a deceased child's corneas without the parents' consent. Newman, 287 F.3d at 788. The parents brought suit under section 1983, claiming that their right to possess the body of a deceased family member was a property interest protected by the Fourteenth Amendment. Id. The court held that the "parents had property interests in the corneas of their deceased children protected by" the Fourteenth Amendment. Id. at 796.

To the extent Plaintiff's claim is based on a property interest in the heart itself, Newman is distinguishable. The court's conclusion in that case cannot be extended to body parts other than corneas, as the court based its decision on California Government Code section 27491.47(a), which at the relevant time, authorized coroners to "remove and release or authorize the removal and release of corneal eye tissue from a body within the coroner's custody, if . . . the coroner has no knowledge of objection to the removal . . . ." See id. at 788 n.1 (quoting Cal. Gov't Code § 27491.47(a))(omission in original), 795. The court acknowledged more than once that the provisions governing the disposition of corneas were different from those governing the disposition of other body parts. See id. at 795 n.11, 796, 798 n.15 (distinguishing Cal. Gov't Code § 24791 and Cal. Health & Safety Code § 7151.5). The court found that the statute conferred a property interest in the corneas by requiring the coroner to seek consent, and then simultaneously deprived the plaintiffs of that interest without adequate process, by allowing the coroner to proceed if he is unaware of objections when he has not actually sought consent. See id. at 799. Here, contrary to Plaintiff's assertion, nothing in the statute creates a property interest in decedent's heart. California Government Code section 27491.4(a), which authorizes coroners to perform autopsies, provides in part:

> The coroner shall have the right to retain only those tissues of the body removed at the time of the autopsy as may, in his or her opinion, be necessary or advisable to the inquiry into the case, or for the verification of his or her findings. No person may be present during the

> performance of a coroner's autopsy without the express consent of the coroner.

Cal. Gov't Code § 27491.4(a). Unlike the provision governing corneas in Newman, this statute vests sole discretion with the coroner, with no allowance for objection. Newman only found a property interest because of the allowance for objection; as such allowance is not present here, this statute cannot be said to confer a property right. See Newman, 287 F.3d at 799.

Plaintiff also invokes California Government Code section 27491.45(a). That statute vests the coroner with the right to retain body parts for scientific investigation and training:

> The coroner shall have the right to retain parts of the body, as defined in subdivision (g) of Section 7150.1 of the Health and Safety Code, removed at the time of autopsy or acquired during a coroner's investigation as may, in the opinion of the coroner, be necessary or advisable for scientific investigation and training. The coroner may employ or use outside laboratories, hospitals, or research institutions in the conduct of the coroner's scientific investigation or training.

Cal. Gov't Code § 24791.45(a)(1). Like section 27491.4(a), this statute gives the coroner full discretion without the requirement of notice or opportunity to object, and therefore does not create a property interest. See Newman, 287 F.3d at 799. Consent is only necessary if the coroner releases retained body parts to "hospitals, medical educational

research institutions, [or] law enforcement agencies for noncoroner training, educational, and research purposes . . . ." Cal. Gov't Code § 24791.45(a)(2). At most, this creates a limited property interest in the disposition of tissues released to third-parties. It does not, however, create the property interest Plaintiff claims.

Even assuming, arguendo, that Plaintiff has established a property interest, she has not alleged facts showing a deprivation of that interest. If the claimed interest is in the heart itself, Plaintiff's reliance on Newman is misplaced. In that case, the corneas were donated to non-profit eye banks for transplant. Newman, 287 F.3d at 795. By contrast, Plaintiff here recovered the heart after asking Defendants for it. To the extent the property interest is in disposition of Plaintiff's son's remains, the facts alleged demonstrate that the Coroner acted within his statutory authority, so Plaintiff had no property interest. If the Coroner retained the heart for either further investigation of the cause of death or for verification of his findings, he was authorized to do so by California Government Code section 24791.4(a). The Report shows that after reaching the initial conclusion regarding the cause of death on October 26, the Coroner continued to investigate the matter on October 29. Even Plaintiff's allegation that the Coroner had transferred the heart to Stanford for study does not trigger a notice obligation, as California Government Code section 27491.45(a)(1) authorizes him to "employ or use outside laboratories, hospitals, or research institutions in the conduct of the coroner's scientific investigation or training."

Because Plaintiff has failed to identify a property interest protected by the Fourteenth Amendment, she has failed to satisfy the first element of a section 1983 claim. Even if the property interests Plaintiff claims were protected, however, she has failed to allege facts sufficient to show that she was deprived of those interests. Plaintiff's section 1983 claim is therefore dismissed.

VI. JURISDICTION

Of the four causes of action in the FAC, the only one providing a basis for this Court's jurisdiction on removal was the section 1983 claim. See Notice of Removal; 28 U.S.C. § 1441(c). Because that claim has been dismissed, the Court declines to exercise its supplemental jurisdiction over the remaining state law claims. See 28 U.S.C. § 1367(c); Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1189 (9th Cir. 2001) ("Under 28 U.S.C. § 1367(c)(3), a district court has discretion to elect not to exercise supplemental jurisdiction over state claims if it has dismissed the federal claims over which it had original jurisdiction.").

VII. CONCLUSION

For the reasons set forth above, the Court concludes that Plaintiff has failed to allege facts sufficient to state a claim under 42 U.S.C. § 1983. The Court therefore GRANTS Defendants' Motion with respect to the Fourth Cause of Action and ORDERS as follows:

1. Plaintiff's Fourth Cause of Action for unconstitutional deprivation of property under

42 U.S.C. § 1983 is DISMISSED WITH PREJUDICE.

2. This matter is REMANDED to the San Mateo County Superior Court for further action on the remaining claims.

IT IS SO ORDERED.

Dated: July 10, 2008

/s/ Samuel Conti
UNITED STATES DISTRICT JUDGE